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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KIMBERLY COUNTS-LINESES,

Defendant and Appellant.

D068193

(Super. Ct. No. JCF31318)

APPEAL from a judgment of the Superior Court of Imperial County, Jeffrey B. Jones, Judge. Affirmed.

William G. Holzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Andrew S. Mestman and Michael Pulos, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Kimberly Counts-Lineses of insurance fraud (Pen. Code, § 550, subd. (a)(1)) in connection with a claim she made based on a fire at her home. At trial, the prosecutor introduced a police investigator's recorded interview with Counts-Lineses in which she admitted to claiming losses for items that were not damaged or destroyed in the fire. On appeal, she argues the trial court should have excluded her inculpatory statements on the grounds that she invoked her *Miranda*¹ right to counsel during the interview, or alternatively, that improper police statements and tactics rendered her *Miranda* waiver and statements involuntary. The People contend she forfeited her appellate claims or, in the alternative, did not meet her burden of establishing reversible error.

We conclude Counts-Lineses forfeited her claim based on having invoked her right to counsel. Additionally, to the extent her alternative claim is preserved, we conclude that substantial evidence supports the trial court's finding that her *Miranda* waiver and statements were voluntary. Accordingly, we will affirm the judgment.

¹ *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

FACTUAL AND PROCEDURAL BACKGROUND

The Fire, Insurance Claim, and Police Investigation

In late January 2013, Counts-Lineses obtained fire insurance coverage for her home in Seeley, west of El Centro.² She also moved various items, including furniture, televisions, personal items, and memorabilia, from her home to a storage unit.

A fire damaged the home in Seeley about one week later, and soon thereafter Counts-Lineses filed an insurance claim for almost \$100,000 in fire damage to personal property, including high-priced items she reportedly purchased within the preceding year. The insurance company paid Counts-Lineses the policy limit of \$66,000 for her claimed personal property losses.

The cause of the Seeley house fire was investigated by the fire department. The investigator ruled out accidental causes and characterized the fire as "a possible arson," which caused police to investigate the incident. Police obtained search warrants for Counts-Lineses's home, as well as for an apartment she leased in San Diego and a storage locker. In the Seeley home, police could not find any remains of "big ticket" or other items Counts-Lineses claimed were damaged by the fire. Police did, however, locate many of the allegedly destroyed items, intact and undamaged, in Counts-Lineses's storage locker and the San Diego apartment.

² Counts-Lineses secured insurance despite ongoing financial difficulties and previous unsuccessful attempts to obtain coverage; prior to 2013, insurers canceled several policies when she failed to pay the premiums.

In connection with executing the search warrant at her apartment, officers lured Counts-Lineses into meeting them there by saying they might have found a golf cart she had reported as stolen. The officers then completed their search, and investigator Romeo Santiago interviewed her. According to Counts-Lineses, she and Santiago first spoke together in the living room for about five minutes, then moved to a bedroom where they spoke for another few minutes, after which time Santiago began tape-recording their conversation.

In the tape-recorded portion of the interview, Santiago began by telling Counts-Lineses that he was conducting a criminal investigation. She subsequently made two statements referencing "a lawyer." Santiago proceeded to read her her *Miranda* rights and asked if she understood each one, to which she repeatedly replied, "yes." This dialogue ensued:

"Q: You—you do understand—completely understand your rights, correct?

"A: Yes.

"Q: As I—as I read 'em to you? Okay, will you be willing to talk to me without your attorney about this—this whole thing?

"A: I'm gonna tell you . . . the truth and what has happened so far. Number 1"

When Santiago asked Counts-Lineses about the various discrepancies discovered by investigators, she was unable to explain them. After Santiago placed Counts-Lineses under arrest, she admitted to lying on her insurance claim and listing items that were not actually damaged by the fire. She was charged with insurance fraud and arson.

Counts-Lineses's Motion to Suppress

Counts-Lineses filed a pretrial motion to suppress the post-*Miranda* inculpatory statements she made to Santiago. In particular, Counts-Lineses based her motion on the following two grounds: (1) "[the] police made promises of leniency to [her] which render [her] statements involuntary"; and (2) "[the] police failed to honor her request to cease questioning so she could obtain an attorney." According to Counts-Lineses's supporting declaration, Counts-Lineses made her inculpatory statements as a result of "promises of leniency," and Santiago continued questioning her after she invoked her right to an attorney. The People opposed the motion and attached a transcript of the tape-recorded portion of the interview.³ At the hearing on the motion to suppress, defense counsel argued that the motion was based on officers' improper statements and actions "before the tape-recorder got switched on."

At the hearing, Counts-Lineses testified that the officers lured her to the apartment and prevented her from using her cell phone as they finished their search, although she acknowledged that they did not handcuff or otherwise restrain her. She also testified that, when she brought up the "subject of an attorney" *before the tape-recorded interview*, the officers told her not to contact anyone, indicating that they would arrest her otherwise. Before Counts-Lineses and Santiago moved to the bedroom where he began tape-recording the interview, Counts-Lineses believed she would be allowed to go "on [her]

³ In her motion, Counts-Lineses stated that she had not been provided either a copy of her recorded interview or a transcript of it through discovery; rather, she had relied on information from Santiago's police report.

way" afterward, not thinking she would be detained. Counts-Lineses expressly testified that she did not ask for a lawyer during the tape-recorded interview.

In response, Santiago testified at the hearing that the officers denied Counts-Lineses's request to use a cell phone because they needed information from her, since they were searching the premises for various items and did not want to be interrupted by her calling or texting others. Santiago further testified that Counts-Lineses did not bring up the subject of an attorney or request an attorney prior to the interview, he never promised not to arrest her in exchange for her cooperation, and she voluntarily agreed to talk to him after having received her *Miranda* rights. He stated that he did not try to dissuade Counts-Lineses from obtaining an attorney.

The trial court denied the motion to suppress, finding that Counts-Lineses did not request an attorney prior to the interview, the officers did not dissuade her from requesting an attorney, and they did not use coercive tactics to obtain her statements. The court described Santiago's testimony as "direct, forthright, on point, and corroborated"—in contrast to Counts-Lineses's testimony, which the court described as "very vague" and "oblique." Along the same lines, the court concluded that Counts-Lineses made voluntary statements to police, explaining that she merely testified regarding her "impression" of being coerced, but presented no evidence of the officers doing or saying anything specifically coercive.

The jury convicted Counts-Lineses of insurance fraud,⁴ and she appeals.

⁴ The jury was unable to reach a verdict on the arson charge.

DISCUSSION

I. *Counts-Lineses Forfeited the Claim That She Invoked Her Miranda Right to Counsel During the Interview*

On appeal, Counts-Lineses argues that the trial court should have excluded her incriminating statements to Santiago based on her request for counsel made *during the tape-recorded interview*. The People contend she forfeited this appellate claim because her motion to suppress was directed only to her alleged request for counsel made *before* Santiago began tape-recording. Significantly, on appeal, Counts-Lineses no longer argues that she requested a lawyer *before the tape-recorded interview started*.

On appeal, Counts-Lineses acknowledges that, in the trial court, she disclaimed having requested an attorney *during the tape-recorded interview*. Nevertheless, she argues that she preserved her current appellate argument because she based her written motion on the occurrence of a *Miranda* violation at the time of the execution of the search warrant, and the transcript of the tape-recorded interview was before the trial court.

A constitutional claim is forfeited on appeal when the appellate argument is based on a factual basis and analysis different from that presented to the trial court. (*People v. Tully* (2012) 54 Cal.4th 952, 980, 979 (*Tully*) [claim of unreasonable search and seizure forfeited to the extent it involved "analyses the trial court was not asked to conduct and potentially required factual bases additional to those adduced at the hearing"].) The rationale for the rule of forfeiture in such circumstances is that "the parties had no incentive to fully litigate this theory below, and the trial court had no opportunity to

resolve material factual disputes and make necessary factual findings." (*People v. Ray* (1996) 13 Cal.4th 313, 339 (*Ray*).) " ' This is an elemental matter of fairness in giving each of the parties an opportunity adequately to litigate the facts and inferences relating to the adverse party's contentions.' " (*People v. Williams* (1999) 20 Cal.4th 119, 136.)

Based on the foregoing, we conclude that Counts-Lineses forfeited appellate review of her claim that she invoked the right to counsel *during the tape-recorded interview*. Here, the trial court was not asked to determine whether Counts-Lineses requested counsel at any time *during the tape-recorded interview*, and we decline to do so in the first instance on appeal.⁵

II. *The Trial Court Did Not Err in Denying the Motion to Suppress Based Police Actions or Statements*

As an alternative claim, Counts-Lineses contends that Santiago misled or coerced her into waiving her *Miranda* right to counsel. To the extent this argument is based on statements Santiago made *during the tape-recorded interview*, for the reasons explained in part I., *ante*, Counts-Lineses did not preserve the argument for appellate review, and we deem it forfeited.

Counts-Lineses's opening brief on appeal also might be read to include an assertion that coercive police tactics *prior to the tape-recorded interview* caused her

⁵ Even if we were to consider the argument in the first instance (see *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [appellate court has discretion to consider issue raised for the first time on appeal where issue does not involve admissibility of evidence]), we question the viability of her claim of a *Miranda* violation during the recorded interview, given Counts-Lineses's uncontradicted testimony, confirmed in the transcript of the interview, that she did not ask for an attorney during the recorded portion of the interview.

either to waive her right to counsel under *Miranda* or to cooperate voluntarily with the police—in either event, according to Counts-Lineses, rendering her tape-recorded statements inadmissible.⁶ Under *Miranda*, "evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." (*Miranda, supra*, 384 U.S. at p. 476; *People v. Suff* (2014) 58 Cal.4th 1013, 1080.) In addition, a confession is involuntary and thus inadmissible where the accused's statement " 'was " 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence[.]' " ' " (*People v. Benson* (1990) 52 Cal.3d 754, 778.)

Under either theory—*Miranda* waiver violation or improper police conduct—when reviewing the voluntariness of a defendant's statements, we engage in a two-part analysis. First, we review whether substantial evidence supports the trial court's resolution of disputed facts and inferences, including its evaluation of credibility of witnesses. (*People v. Dykes* (2009) 46 Cal.4th 731, 751-752 [*Miranda* waiver], 752 [improper police conduct].) Second, based on the supported facts, we independently review the trial court's legal determination. (*Id.* at p. 751.)

⁶ More specifically, Counts-Lineses's appellate argument is that the police used improper techniques in luring her to the apartment and preventing her from cell phone use during the search. In contrast, in the trial court, Counts-Lineses based her police coercion argument on promises of leniency. As such, she potentially forfeited appellate review of the police coercion argument, since the trial court was not presented with the specific grounds she now raises on appeal. (*Tully, supra*, 54 Cal.4th at pp. 979-980; *Ray, supra*, 13 Cal.4th at p. 339.) However, because the trial court record is well developed, we exercise our discretion to reach the merits of Counts-Lineses's appellate argument.

Under the substantial evidence test, we review the whole record in a light most favorable to the order denying suppression (*People v. Jenkins* (2000) 22 Cal.4th 900, 969) to determine whether it discloses "evidence 'reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case" ' " (*People v. Samuel* (1981) 29 Cal.3d 489, 505). In our review of the record we consider only the substantiality of the evidence *in support of the ruling actually made*, not whether other evidence in the record "might also be reasonably reconciled with a contrary finding." ' " (*People v. Snead* (1991) 1 Cal.App.4th 380, 384 [sufficiency of evidence in support of ruling on motion to suppress].)

As to the factual circumstances here, the trial court found no evidence that officers said or did anything coercive to obtain Counts-Lineses's statements. Further, the court highly credited Santiago's detailed testimony—which included his express denial of having made any promises of leniency and his explanation of his colleagues' legitimate noncoercive reason for not allowing Counts-Lineses to use her cell phone during the search—as "direct, forthright, [and] on point." Finally, the court found Counts-Lineses's testimony "very vague," "oblique" and merely consisting of "impression[s]" of being coerced, as opposed to facts of coercion. Accordingly, the court's findings related to the circumstances surrounding Counts-Lineses's admissions are supported by substantial evidence. Given these findings, we conclude that the challenged evidence was admissible.

Accordingly, the trial court did not err in denying Counts-Lineses's motion to suppress or in admitting her voluntary inculpatory statements at trial.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.